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No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,

VS.

SECRETARY, DEPARTMENT OF THE INTERIOR,
Respondent.

VS.

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondent-Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Truckee-Carson Irrigation District, a special district wholly comprised of and financed and governed by the landowners in the Newlands Reclamation Project, has standing to challenge the validity and enforcement of the federally promulgated Operating Criteria and Procedures for the Newlands Reclamation Project based on the injurious impact of those Criteria on its constituent project landowners.

2. Whether a district court, in an action to review administrative regulations, has the power validly to formulate and order promulgation and enforcement of specific regulations over the objection of the executive officer to whom Congress has entrusted rulemaking authority, and whether purported regulations so promulgated can be enforced to abrogate the rights of persons not otherwise within that court's jurisdiction.

3. Whether the Reclamation Act or any other provision of law authorizes the Secretary of the Interior to adopt rules and regulations which reduce reclamation project water diversions to less than the amount needed to satisfy the beneficial use requirements of the project landowners, and which impose on those landowners costs beyond their ability to repay.

4. Whether the courts below erred in finding that the Truckee-Carson Irrigation District has no protectible Fifth Amendment rights under the Orr Ditch Decree, the Truckee River Agreement, and/or the 1926 Project Operating Contract.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 742 F.2d 527, and reproduced in the Appendix at pages 1 to 10. The unreported decision of the district court, entered August 18, 1983, is reproduced in the Appendix at pages 11 to 32. The holding of the district court was subsequently clarified by its Order entered October 26, 1983, which is reproduced in the Appendix at pages 33 to 34.

JURISDICTION

The Court of Appeals' decision herein was rendered on September 10, 1984. Petitioner Truckee-Carson Irrigation District filed a timely Petition for Rehearing which was denied on October 31, 1984. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty or property without due process of law.

Section 10 of the Reclamation Act of June 17, 1902, provides:

> The Secretary of the Interior is hereby authorized to . . . make such rules and regulations as may be necessary and proper for the purpose of carrying out the provisions of [the Reclamation Act of June 17, 1902 and Acts amendatory and supplemental thereto]. (43 U.S.C. § 373.)

Section 8 of the Reclamation Act of June 17, 1902, provides:

> Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right. (32 Stat. 390; 43 U.S.C. §§ 372, 383)

The case also involves the "Operating Criteria and Procedures for Coordinated Operation and Control of the Truckee and Carson Rivers for Service to Newlands Project," found in *Pyramid Lake Paiute Tribe v. Morton,* 354 F.Supp. 252, 262-266 (D.D.C. 1973), and set forth verbatim in the Appendix hereto at pages 94 to 102.

STATEMENT OF THE CASE

A. Introduction

This case presents yet another round in the never-ending tug-of-war between the Pyramid Lake Paiute Tribe of Indians [hereinafter "the Tribe"] and their upstream neighbors, the Newlands Project farmers, over their relative rights to the waters of the Truckee River. In this case the project farmers, represented by petitioner Truckee-Carson Irrigation District [hereinafter "TCID" or "the District"],[1] sought to have invalidated and to

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[1] Truckee-Carson Irrigation District is a political subdivision of the State of Nevada. Its constituents are the farmers and landowners of the

prevent the enforcement of project Operating Criteria formulated and mandated by a distant court in a lawsuit to which they were not parties. The Criteria operate to reduce the project's diversion entitlement to Truckee River flows in order to provide the Pyramid Lake Paiute Tribe with additional water above that decreed to it in a 1944 comprehensive water right adjudication of the Truckee River. *See United States v. Orr Water Ditch Co.*, Equity A-3 (D.Nev. 1944); *Nevada v. United States*, . . U.S. . ., 103 S.Ct. 2906 (1983). The allowable diversion established by the Operating Criteria is significantly less than the amount necessary to satisfy the vested rights of the project farmers, as determined by two court decrees and the practical experience of more than half a century. In the decisions below, the district court and the Ninth Circuit Court of Appeals upheld the validity of the challenged Criteria and refused to enjoin their enforcement against TCID and the project farmers.

B. Genesis of the Newlands Project Operating Criteria: The Tribe v. Morton Case

The seeds of the instant dispute are found in litigation brought by the Tribe in 1970 against the Secretary of the Interior [hereinafter "the Secretary"] in the District of Columbia District Court.[2] In that action, the Tribe sought judicial review of Operating Criteria which had been devised by the Secretary as regulations governing TCID's operation of the federal Newlands Reclamation Project pursuant to its contract with the United States. App. 36-

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federal Newlands Reclamation Project. The District was organized by the Newlands Project farmers to deal with the United States on their behalf in matters concerning the operation of the Newlands Project.

[2] *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252 (D.D.C. 1973), hereinafter referred to as "*Tribe v. Morton*".

74.[3] The Tribe asserted that the Secretary's Operating Criteria permitted TCID to divert more water than it was entitled to divert, and permitted wasteful use of water by the Newlands Project farmers. Permitting such allegedly excessive diversions unnecessarily depleted the Truckee River flows needed for maintenance of Pyramid Lake located on the Tribe's Reservation downstream, the Tribe contended, and thus violated the Secretary's fiduciary duty to the Tribe. 352 F.Supp. at 257.

The Tribe did not join TCID or its farmers as parties to the action, and it opposed the Secretary's motion to have the matter either dismissed for failure to join indispensable parties or transferred to the District of Nevada District Court. The District of Columbia District Court declined to transfer or dismiss, and the case proceeded despite the absence of the farmers and TCID.

The *Tribe v. Morton* court found the project diversion allowance of the Secretary's Operating Criteria to be arbitrary and unreasonable, holding that it unnecessarily deprived the Tribe of water by failing to prevent the

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[3] Shortly after its formation, on December 18, 1926, TCID and the United States entered into a contract [hereinafter "the operating contract"] pursuant to which the Newlands Project works were transferred to TCID's care, operation and maintenance. The 1926 operating contract preserved the right of the Secretary of the Interior to "make reasonable rules and regulations . . . as may be deemed proper and necessary to carry out the true intent of the law and of this contract," and the District agreed that "in the operation of the transferred works, all such rules and regulations will be fully adhered to." App. 66. It reserved the United States' right to terminate the contract for breach of its provisions. Finally, the operating contract provided that "[T]he lands of the Truckee and Carson Divisions shall have a prior right to the economical and beneficial use of all such waters in sufficient quantities to properly irrigate 87,500 acres of land and until such priority has been satisfied none of the waters of the [Truckee and Carson] streams shall be diverted or impounded by the United States for use upon other lands." App. 67.

project's wasteful use of water,[4] and by relying solely on the *Orr Ditch* decree,[5] to the exclusion of the *Alpine* Temporary Restraining Order,[6] in calculating the amount of water which could be diverted from the Truckee River for the Newlands Project. 354 F.Supp at 256-57. The court then invalidated the regulations and ordered the Secretary to submit amended regulations to it for consideration. The Secretary was directed to either assure annual delivery of 385,000 acre feet of Truckee River water to Pyramid Lake,[7] or explain his failure to do so

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[4] In TCID's absence, the Tribe's allegation of project water waste had gone unchallenged by the Secretary. Not surprisingly, on that uncontested record, the court found that such waste had been "conclusively" shown by the evidence. *See* n. 6, *infra*.

[5] *United States v. Orr Water Ditch Co.*, Equity No. A-3 (D.Nev. 1944) [hereinafter *"Orr Ditch"*], was a comprehensive adjudication of Truckee River water rights, binding on the Tribe and on TCID and the Newlands Project farmers. *Nevada v. United States, supra,* .....U.S. at ....., 103 S.Ct. at 2925. The *Orr Ditch* decree provided a water duty of 3.5 acre feet per acre [hereinafter "afa"] for bottomlands and 4.5 afa for benchlands within the Newlands Project.

[6] *United States v. Alpine Land & Reservoir Co.*, 503 F.Supp. 877 (D.Nev. 1980), *aff'd* 697 F.2d 851 (9th Cir. 1983) [hereinafter *"Alpine"*], in which TCID participated as a party, representing the project farmers, was a comprehensive adjudication of the water rights of the Carson River in Nevada. The Carson River is in a different watershed from Pyramid Lake. The *Alpine* Temporary Restraining Order provided a water duty of 2.92 afa for the same project lands governed by the *Orr Ditch* final decree. The *Alpine* final decree, however, held that 3.5 and 4.5 afa water deliveries were reasonably required to satisfy the beneficial use needs of the Newlands Project. The contention that the Newlands Project farmers were wasting water was adjudicated and rejected by the *Alpine* court, whose determination was upheld on appeal.

[7] The *Orr Ditch* final decree, in contrast, had awarded the United States approximately 30,000 afa for use on the Pyramid Lake Reservation.

and provide a plan to accomplish that end "in the immediate future." *Id.* at 258.

When the Secretary's proposed amended regulations failed to assure the delivery directed by the court, the court rejected his submission and invited the Tribe to submit its own proposal for Operating Criteria. The Tribe's proposed Operating Criteria were adopted almost verbatim by the court, *see* App. 4, which then entered its final Memorandum and Order, directing the Secretary to "publish and implement and enforce" them. 354 F.Supp. at 261; App. 92.

While the *Tribe v. Morton* court's Order purported not to interpret or affect rights accorded by either the *Orr Ditch* or the *Alpine* decree, 354 F.Supp. at 262, in fact it reduced diversions to Newlands Project lands from the 406,000 acre feet previously established by the Secretary's regulations [8] to a maximum of 350,000 acre feet for the then-current water year, and 288,129 acre feet per year thereafter,[9] a reduction of nearly one-third. Finally,

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[8] TCID has never conceded that the Secretary is authorized by the Reclamation Act to control diversion levels by regulation. *See* pp. 22 to 27, *infra*. However, it complied with those limits so long as they permitted TCID to supply the project farmers with sufficient water to satisfy their needs for beneficial use.

[9] This diversion limit was derived by applying the 2.92 acre foot per acre water duty contained in the *Alpine* Temporary Restraining Order while ignoring the 3.5 to 4.5 acre foot per acre water duties established for the same acreage and guaranteed the Newlands farmers by the *Orr Ditch* Final Decree. The Ninth Circuit was well aware of the substantial invasion of the farmers' vested rights effected by the Criteria's diversion limit. In its earlier *Alpine* decision, it had acknowleged that imposing even the more generous water duty of 3 afa "would drastically reduce the farmers' yields." 697 F.2d at 857.

the court-adopted Criteria required that TCID's operating contract be terminated should the District "substantially violate" any of the Criteria. *Id. See also* App. 4, 31, 101.[10]

The Secretary immediately requested that the Justice Department appeal the court's Order. App. 106-107. The Justice Department refused without comment. App. 31, 108. In obedience to the court's Order, the Secretary published its Judgment and Order setting forth the mandated Operating Criteria in the Federal Register on March 12, 1973. App. 89-102.

When, to satisfy its contractual and fiduciary obligations to its constituent project farmers, the District diverted more Truckee River water than permitted by the Operating Criteria, the Secretary, by letter of September 14, 1973, notified TCID of the termination of its operating contract, App. 109-113, as mandated by the *Tribe v. Morton* court's Order. App. 31.

C. Challenge to the Operating Criteria: Trial Court Proceedings In This Action

Following the Secretary's notice to it that the Operating Criteria were being enforced by termination of TCID's operating contract, TCID, on its own behalf and on behalf of its constituent farmers, filed this action in the District Court for the District of Nevada, App. 114-141, invoking the jurisdiction of the court pursuant to 28 U.S.C. § 1331(a). It sought a declaration of rights concerning the validity and applicability of the court-ordered

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[10] The court directed that additional operational measures be imposed on TCID to minimize its water demand. TCID has objected to many of these measures as unauthorized by the Reclamation Act because they would, if implemented, require expenditures of funds far beyond the payment capacity of the farmers who own the project land. *See* 43 U.S.C. §§ 485; 485b-1; 390; 485h(a)(3); 504.

Operating Criteria, and challenged the Secretary's termination of its contract for their violation.

TCID contended that the Operating Criteria could not be applied to the operation of the Newlands Project for several reasons. First, the Criteria were not the product of the administrative discretion of the Secretary of the Interior to whom Congress had entrusted rulemaking authority over Reclamation projects, but were rather a court order. Second, the *Tribe v. Morton* court's order could not constitutionally be applied to limit rights of the non-party project farmers or the District. Third, whether analyzed as a court order or as "regulations", the Operating Criteria were unauthorized by law for they operated to deprive TCID and its landowners of vested water rights guaranteed them by the *Orr Ditch* final decree and to deny water needed for beneficial use of project lands, contrary to the specific mandate of the Reclamation Act. Finally, TCID contended that its failure to comply with the unauthorized and inapplicable Operating Criteria could not constitute a breach of its contractual obligation so as to justify termination of the operating contract.

D. The District Court Decision Below

Paradoxically, the district court both recognized and ignored the central issue in TCID's challenge to the Operating Criteria—the fact that they were judicially formulated and imposed upon absent non-parties.

The court's opinion began by acknowledging that "the operating criteria challenged in the present case were formulated and approved by the Court in *Tribe v. Morton*." App. 20. It described the *Tribe v. Morton* action as follows:

> This action poses a unique case procedurally and juridically. We do not question the right of the Paiute Tribe to attack the 1972 operating criteria as arbitrary, capricious and an abuse of the Secretary's

> authority. The Tribe chose to do so by action in the District Court for the District of Columbia, naming only the Secretary of Interior as a defendant. It chose not to name as defendants its true opponents, the Lahonton [sic] Project farmers represented by the TCID. The district court chose not to require the joinder of the TCID. The TCID chose not to intervene as a real party in interest. Thus, the action proceeded as an ex parte action in a substantial sense, the Secretary of Interior being pretty much in the position of a stakeholder. The final result was the promulgation of the 1973 operating criteria at the direction of the court. The Secretary was unquestionably subject to the jurisdiction of the court, and was in jeopardy of contempt if he disdained to comply. The Department of Justice refused to appeal.

App 30-31. The court expressly noted that

> This is not the normal case of rules and regulations promulgated in the implementation of a government contract. . . .

App. 31.

Having thus recognized that the Operating Criteria were not the product of administrative rulemaking, the court nonetheless proceeded to ignore this critical fact and to evaluate them as though they were. Avoiding the central issue entirely, the court performed only a limited review under the dictates of *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), and found that since the regulations "were promulgated by the Secretary under the guidance of Judge Gesell"—who also determined that they were "consistent with the Secretary's

legal and fiduciary obligations"—it was clear that "relevant factors were considered and that no error in judgment was made." App. 24.[11]

The trial court rejected TCID's contention that the court-mandated enforcement of the court-ordered Operating Criteria against non-parties violates the due process rights of TCID and its landowners. In fact, it altogether ignored the impact of the Criteria on the farmers' vested water rights which TCID had raised, App. 25,[12] and held only that *TCID* had no constitutionally protected rights. TCID's only right was to manage the project in conformity with the Secretary's rules and regulations which, the

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[11] Even under its limited *"Overton Park"* review, the district court could not endorse the Criteria it refused to invalidate. It noted:

> There are portions of the District of Columbia decree which cause one to ponder. The opinion does not show that the [*Tribe v. Morton* court's finding that] 288,120 acre feet diversion through the Truckee canal would ultimately be adequate was any less of a "judgment call" than the [Secretary's] 1972 allowed diversion of 378,000 acre feet. Also, it is not at all clear to this Court that the District of Columbia Court's directive to the Secretary to invoke the sanctions of Article 32 of the 1926 contract . . . [the termination provision] was within the competence and authority of the judge.

App. 31. And the court felt compelled, in a subsequent order, to correct any impression that it "approved the Operating Criteria," stating that it believed "many aspects of the criteria to be improvident if not unreasonable" and that all it had done by its Judgment was "approve the method of promulgation and declare the criteria to be enforceable against TCID until modified or set aside." App. 33.

[12] TCID had challenged the enforcement of the Criteria on the grounds, *inter alia*, that it would deprive the project landowners of property rights without due process, App. 124, 128-134, 135-136. In their answers, neither the Tribe nor the United States disputed TCID's representational capacity with regard to the project farmers; rather, both denied that the farmers owned any valid Truckee River water rights which were infringed by the Criteria. Consistent with this posture, the Pre-Trial Order also recognized that TCID was in court to vindicate its constituents' rights as well as its own. App. 147, 148.

court held, it had no right to disregard, even if they were unauthorized or invalid. App. 27, 29, 30, 32. Thus, the court found no constitutional impediment to enforcement of the Criteria.

Neither did the trial court, except by implication, address TCID's contention that the Reclamation Act does not empower the Secretary to reduce by rulemaking the farmers' vested water right entitlements to sufficient water for beneficial use. Instead, the court sidestepped this basic issue, stating:

> The Orr Ditch Decree granted the United States the right to divert water from the Truckee River for irrigation of the project. This water is "under such control, disposal and regulation as the [United States] may make or desire". The only limitation on the Secretary's ability to regulate the water supply is an upper limit. Here, the Secretary issued a regulation reducing the amount of water to be diverted. Consequently, the reduction was within the Secretary's authority.

App. 23-24.

In so holding, it ignored its own earlier determination in *Alpine* (pending which it had delayed resolution of this case, App. 12), that beneficial, non-wasteful, project irrigation requires 3.5 and 4.5 afa, which is precisely the amount decreed in *Orr Ditch*, implemented by the Secretary's challenged Operating Criteria, and then radically reduced by the *Tribe v. Morton* court's decree.

E. The Ninth Circuit's Decision Below

In an opinion notable for its dearth of citational authority the Ninth Circuit court managed to affirm the district court's decision. This result was accomplished by denying TCID's standing to assert or protect the collective water rights of its constituent farmers which, as the court was

aware, the Criteria infringed. *See Alpine, supra,* 697 F.2d at 857; *see also* discussion *supra* at 6, n.9. It held:

> Even if the [*Tribe v. Morton*] court did interfere with [the Newlands Project farmers'] water rights, TCID has no Fifth Amendment claim based on this interference because it would not have lost any property as a result of this interference. Only those who would have lost property, the owners of land with water rights, could claim a deprivation of property without due process.

App. 6.

Instead, the court focused narrowly on TCID's rights under its operating contract, which it defined as "limited to managing the project as long as the Secretary's rules and regulations were followed." App. 7. The court conceded that "If this right to manage the Project was taken from TCID in the *Tribe v. Morton* suit, TCID's property, this right to manage, may well have been taken without due process of law. . . ." App. 6.

However, it concluded that because "TCID had no water rights", "[o]nly the nature of its managerial duty was affected. This does not amount to a taking of property without due process." App. 7.

In response to TCID's contention that a court-authored and mandated decree, entered over the Secretary's objection, cannot constitute valid rules adopted by the Secretary, the Ninth Circuit again held that TCID had no standing. The court declared that only the Secretary could seek to vindicate his discretionary rights, and *"he chose* not to appeal", App. 8, emphasis added. In so holding, the court ignored the district court's findings both that the Criteria and their enforcement had been judicially compelled, *see* App. 31, and that the lack of an

appeal had had nothing to do with the *Secretary's* choosing, his request for an appeal having been flatly rejected by the Department of Justice. App. 31.

The Ninth Circuit also rejected summarily TCID's contentions that the Criteria were outside the scope of rulemaking authority granted the Secretary by the Reclamation Act, and contravened the Act's purpose and intent, stating only:

> The Secretary did not exceed his authority when he adopted the operating criteria. In the 1926 contract, the Secretary explicitly reserved the right to issue regulations governing the operation of the Newlands Project. This reservation allowed the Secretary to issue the regulation restricting the amount of water that would be diverted. Similarly, even if the operating criteria were more restrictive than similar conditions under the 1926 contract, this change was within the Secretary's authority.

App. 9.

Finally, the Ninth Circuit held that the Criteria were neither arbitrary nor capricious, for they "were adopted under the direction of the *Tribe v. Morton* court after the court and the Secretary considered the Secretary's obligations to TCID, to the water rights owners, and to the Tribe." App. 9.

ARGUMENT

A. The Decision Below Unsettles Rights Which This Court's Recent Decision in *Nevada v. United States* Finally Confirmed.

This is not the first time that this dispute and these parties have been before this Court. Just two Terms ago this Court affirmed that the *Orr Ditch* final decree protects the Newlands Project farmers' vested water rights

from diminishment for the benefit of the Pyramid Lake Paiute Tribe of Indians. The Court recognized *Orr Ditch* as a comprehensive water adjudication "intended to settle once and for all the question of how much of the Truckee River each of the litigants was entitled to." *Nevada v. United States*, ___ U.S.___, ___, 103 S.Ct. 2906, 2925 (1983). The Court held that the Reservation's water right had been finally quantified in that case and that the Tribe was not free to assert or enforce against the Newlands Project farmers any claim to additional water beyond the amount decreed to the Reservation therein. The decision expressly recognized the project farmers' ownership of their water rights and the Government's lack of managerial authority over those rights. The *Nevada* decision should have brought to an end the farmers' long, bitter, and expensive struggle to secure their rights against the threat of loss for the benefit of the Pyramid Lake Reservation. Incredibly, it did not. Less than two years later, the Ninth Circuit has rendered illusory the protection which this Court's decision gave those rights.

The Ninth Circuit's decision below has accomplished a breath-taking end run around this Court's validation of the farmers' *Orr Ditch* water rights, by upholding and enforcing Operating Criteria which indisputably invade and drastically reduce those rights for the sole purpose of supplying the Tribe with the very water to which this Court just held it is not entitled.

The Operating Criteria formulated by the *Tribe v. Morton* court and approved by the Ninth Circuit in its decision below were designed to "assure delivery of 385,000 acre-feet of water annually to Pyramid Lake," 354 F.Supp. at 258—more than ten times the amount awarded the Tribe in *Orr Ditch*. The express basis of the Criteria was the Tribe's assertion of "well-founded rights." 354 F.Supp. at 256.

This Court's determination that the Tribe's rights were *not* "well-founded" and, in fact, could not be asserted to enlarge its water entitlement at the expense of the Newlands Project farmers, went unheeded by the Ninth Circuit in spite of Petitioner's extensive briefing and argument on that very subject. Instead, in the face of *Nevada v. United States*, the Ninth Circuit upheld the Criteria and enforced the very transfer of water entitlement which this Court had refused to permit. In so doing, the Ninth Circuit stripped the project farmers of the judicial protection which this Court's decision would have provided, had it been given effect. Apparently in the Ninth Circuit the *Orr Ditch* decree did not "end the dispute" between the farmers and the Tribe, did not "settle once and for all the question of how much of the Truckee River each of the litigants was entitled to," nor operate to "hold the Reservation to the claims it made in *Orr Ditch,*" despite this Court's clear holding that it did. *Nevada v. United States, supra,* .... U.S. at ...., 103 S.Ct. at 2925-2926.

The disruptive impact of the decision below is demonstrated by subsequent proceedings in the *Orr Ditch* court, which retains jurisdiction over the administration of the Truckee River water rights it decreed in 1944. When that court recently ordered diversions to Lahontan Reservoir to satisfy the Newlands Project farmers' decreed rights, App. 155, the United States filed a motion, now pending, to set the order aside on the ground that it "violate[s] the sovereign rights of the United States," App. 159, citing the *Tribe v. Morton* court's decree and the trial court's decision in this case. The United States asserts that the *Orr Ditch* court's order "directly conflicts with the order of the District of Columbia Court," App. 158, which, it contends, controls the administration of the river, citing the decisions hereinbelow.

In very real effect, what the Ninth Circuit has accomplished is to reinstate the same decision which this Court

reversed in *Nevada*—the decision that the Tribe may invade the settled rights decreed to the Newlands Project farmers by *Orr Ditch*. For this reason, the Court should accept for review, and then reverse, the decision below.

B. The Ninth Circuit Decision Squarely Conflicts With This Court's Decision in *Hunt v. Washington State Apple Advertising Commission*.

The basis on which the Ninth Circuit managed to avoid ruling on TCID's constitutional challenges to the Criteria was by holding that TCID, having no water rights itself, had no standing to raise such a challenge. That fundamental basis of its decision squarely conflicts with this Court's recent decision in *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333 (1977).

The Ninth Circuit's enforcement of the Operating Criteria is constitutionally defensible only if the court could avoid addressing the collision between the vested rights of the farmers and the Criteria. It contrived to do so by denying TCID's standing to assert or protect the rights of its constituent farmers. App. 6. In so doing, it contravened this Court's holding in *Hunt v. Washington State Apple Advertising Com'n., supra,* and foreclosed that avenue of judicial dispute resolution on which a civilized society depends.

In *Hunt* a Washington state agency, established to promote the state's apple industry, sought to vindicate its member apple producers' constitutional rights to engage in unfettered interstate commerce by challenging a commercial regulation imposed on them by a sister state. The Commission's standing to do so was challenged. In arguments which prefigured the Ninth Circuit's reasoning in this case, the *Hunt* appellants contended that because the Commission was a state agency, not itself engaged in the production and sale of apples, the challenged regulation did not injure the Commission; only its members had the

personal stake in the suit's outcome necessary to confer standing. Moreover, the appellants argued, the Commission could not rely on the injury to its members to confer standing on itself to challenge the regulation.

In its unanimous decision in *Hunt*, this Court rejected those contentions and confirmed the Commission's standing to assert and protect its members' interest. It noted that the Commission,

> admittedly a state agency . . . serves a specialized segment of the State's economic community, which is the primary beneficiary of its activities . . . [Its members] possess all of the indicia of membership in an organization. They alone elect the members of the Commission; they alone may serve on the Commission; they alone finance its activities, including the costs of this lawsuit, through assessments levied upon them.

432 U.S. at 344-45. The Court concluded that:

> In a very real sense, therefore, the Commission represents the State's growers and dealers and provides the means by which they express their collective views and protect their collective interests.

Id. at 345.

TCID's organizational status and the basis for its representation of the Newlands farmers' project water rights in this case are indistinguishable from the Commission's posture in *Hunt*. TCID "exists for the purpose of representing its members and protecting or asserting their common interests." *United States v. Truckee-Carson Irr. District*, 71 F.R.D. 10, 16 (D.Nev. 1975). Its farmers are a specialized segment of the state's economic community, and exclusively comprise, govern and finance TCID, which has, since its formation, served as their representative in negotiations and litigation to vindicate their collective water rights. *See, e.g., Nevada v. United States, supra,*

. . . . U.S. at . . . ., 103 S.Ct. at 2923; *United States v. Alpine Land & Reservoir Co., supra.* Moreover, in the Secretary's dealings concerning the Newlands Project, he is statutorily required to deal with the District rather than with the individual project landowners of which it is composed. 43 U.S.C. § 500. Under such circumstances, it indeed elevates form over substance to deny, as has the Ninth Circuit, TCID's standing to assert and protect its constituents' project water rights. The Ninth Circuit's refusal to accord TCID the standing so clearly conferred by this Court's decision in *Hunt* reduces the farmers' access to judicial process to the level of a shell game played without a pea.[13] Because the decision below so squarely and irreconcilably conflicts with that controlling precedent, it merits review and reversal.

C. The Decision Below Raises Important Issues Concerning The Power Of A Federal District Court To Formulate, Issue, And Enforce Administrative Regulations Over The Objection Of The Executive.

The ruling below is worthy of review not only for its negation of this Court's decision in *Nevada v. United*

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[13] The above metaphor is not overstated; the United States has recently filed a motion in the *Orr Ditch* court contending that the farmers are not entitled to judicial relief even when acting directly on their own behalf. The landowners themselves recently obtained an Order from the *Orr Ditch* court permitting diversions necessary to enforce their rights; the United States has moved to set aside that order, contending that if the farmers, as "beneficiaries of the Project, . . . have a complaint about the federal regulations [limiting diversions] they should take it up with the Secretary of the Interior." App. App. 157, n. 1. At the same time, however, the government freely acknowledges that the Secretary "is under court order not to modify his 1973 regulations," App. 158, and is, in fact, "under orders from the [*Tribe v. Morton*] Court not only to publish regulations but to actively enforce them." App. 159. Were the United States to prevail in its motion, the project rights confirmed by this Court in *Nevada v. United States* would remain purely theoretical until "ratified" by an inferior tribunal, the District of Columbia District Court.

States, but also because the issues which TCID raised in its challenge to the Criteria, so tersely brushed aside by the Ninth Circuit, are themselves important issues of recurring jurisprudential concern and of widespread impact.

TCID also challenged the Criteria on the basis that, in formulating and ordering their enforcement, the *Tribe v. Morton* court acted in excess of its constitutionally delegated powers. As a result of this violation of separation of powers principles, TCID argued, the Criteria were void and ineffective.

For nearly one hundred fifty years this Court has consistently affirmed the principle that the courts have no power to control the exercise of administrative discretion. *Stryker's Bay Neighborhood, Etc. v. Karlen*, 444 U.S. 223, 227 (1980); *Vermont Yankee Nuclear Power v. Nat. Res. Defense Council*, 435 U.S. 1197, 1212 (1978); *F.P.C. v. Transcontinental Gas Pipeline*, 423 U.S. 326 (1976); *N.L.R.B. v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 444 (1965); *United States v. Shaughnessy*, 347 U.S. 260, 266 (1954); *F.P.C. v. Idaho Power Co.*, 344 U.S. 17, 20-21 (1952); *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 88 (1943); *Decatur v. Paulding*, 39 U.S. 497, 516 (1840). As recently as last Term, the United States itself argued to this Court that judicial orders mandating that particular action be taken by an executive officer of the United States are "beyond the competence" of the courts. *See Heckler v. Lopez*, . . U.S. . ., 104 S.Ct. 9 (1984).[14] And even the district court below questioned the "competence

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[14] Because the question of a district court's equitable power to order executive action recurs with some regularity it apparently has yet to be definitely addressed by this Court. *See, e.g., Heckler v. Day*, ... U.S. . . . ., ..., 104 S.Ct. 2249, 2257-58 (1984). The instant case presents an outstanding opportunity for this Court to establish meaningful and well-defined guidelines for the lower courts in reviewing administrative actions.

and authority of the [*Tribe v. Morton*] judge to order termination of TCID's operating contract." App. 31.

There is no question that the challenged Operating Criteria were formulated by the *Tribe v. Morton* court and imposed on the Secretary against his will.[15] The district court so found. App. 30-31. There is no question that enforcement of the Criteria by contract termination was also mandated by the *Tribe v. Morton* court. App. 31. And there is no question that the *Tribe v. Morton* court's order effected a complete and permanent arrogation of rulemaking authority, stripping the Secretary of the power entrusted him by Congress and transferring that power instead to the Tribe and the court. *See* 354 F.Supp. at 262.[16] The only question is whether the judicially devised and mandated Criteria exceed the court's competence and, if so, under what magical rationale they can be transmuted from illegitimate judicial action to legitimate executive action for the violation of which penalties may validly be imposed.

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[15] The Ninth Circuit attempted to convert the coercive court order into an exercise of discretion by holding that the Secretary "chose" not to appeal. Such a characterization conflicts with the uncontradicted evidence and with the district court's express finding. App. 31, 103-105, 106, 108. The authority of the Justice Department to control litigation does not endow it with the power to make administrative decisions entrusted by Congress to a different agency, nor can its decisions clothe the judiciary with executive powers denied it by the Constitution.

[16] The challenged *Tribe v. Morton* Criteria are still in effect, and cannot be changed except with the Tribe's or the court's approval. Upon the Secretary's recent attempt to revise them to reflect the project water entitlements that clearly, consistently, and now, finally, are set forth in the decrees governing both the Truckee and Carson Rivers, the Tribe applied to, and obtained from, the *Tribe v. Morton* court an order setting aside and declaring "null and void" the Secretary's proposed modifications. Thus, the Criteria *still* reduce the farmers' decreed entitlements by one-third, the Secretary is *still* compelled by court order to administer them, and the *Tribe v. Morton* court is *still* aggressively enforcing them.

The Ninth Circuit evaded the question by holding that only the Secretary could assert his right to make the discretionary decisions entrusted by Congress to him. Nevertheless, the force and effect of its decision was to uphold the enforceability of the *Tribe v. Morton* court's order against the Newlands Project farmers and TCID.

In so doing, it not only implicitly sanctioned the exercise of judicial power challenged by TCID, but also created a split of authority between two judicial circuit courts of appeal on this important question. The District of Columbia Circuit Court of Appeals, in a case functionally identical to *Tribe v. Morton,* held that a district court had overstepped the bounds of its judicial authority when it rejected the Postal Service's proposed pay differential schedule and instead formulated and issued its own, which it ordered the Postal Service to implement. *Nat. Ass'n. of Postal Sup'rs. v. U.S. Postal Service*, 602 F.2d 420 (D.C. Cir. 1979). The Ninth Circuit's approval and enforcement of the court-formulated and court-ordered Operating Criteria inherently endorses the same exercise of judicial power condemned by the District of Columbia Circuit Court. This issue is clearly ripe for final resolution by this Court. *See discussion supra* at p. 19, n. 14.

TCID contends that "regulations" designed by a district court and imposed upon the Secretary by court order cannot, by definition, constitute rules promulgated by the administrative officer, or be binding as such. To uphold the enforceability of such an order has the constitutionally impermissible effect of extending the reach of the court's jurisdiction over absent parties, allowing it to exercise indirectly that power which the Constitution forbids it to exercise directly. *See, e.g., United States v. SCRAP,* 412 U.S. 669, 691 (1973); *Arrow Transportation Co. v. Southern R.R. Co.,* 372 U.S. 658 (1963); *Cherokee Nation v. State of Oklahoma,* 461 F.2d 674, 681 (10th Cir. 1972), *cert. denied* 409 U.S. 1039 (1972).

Because the issue and the effects of impermissible judicial arrogation of administrative power are so clearly demonstrated by the instant case, and because the decision below creates a conflict between two judicial circuits on this important question, the Court should accept, review, and reverse the Ninth Circuit's approval and enforcement of the *Tribe* v. *Morton* court's decree.

D. The Decision Below Raises Issues of Widespread Impact Concerning The Scope of Secretarial Rulemaking Power Under The Federal Reclamation Act.

TCID also contended below that even if the Secretary, rather than a court, had formulated and adopted the Operating Criteria at issue in this case, they would have been void because (1) they exceed the express limits of the Reclamation Act on Secretarial power, and (2) they neither were designed to nor did further or promote the goals of the Reclamation Act.

This Court has repeatedly held that the water rights appurtenant to project lands are beneficially owned by the project landowners, are acquired by the project farmers' application of water to beneficial use pursuant to state law, and are governed by state law. *See, e.g., Nevada v. United States*, . . U.S. . ., . ., 103 S.Ct. 2906, 2914-2916 (1983); *California v. United States*, 438 U.S. 645, 664 (1978); *Nebraska v. Wyoming*, 325 U.S. 589, 613-614 (1945); *Ickes v. Fox*, 300 U.S. 82, 94-96 (1937).

The Court has also consistently held that the Government's interest in the water rights of reclamation project lands is purely financial; it is that of a lien-holder seeking to secure repayment of the cost of project construction and of its operation and maintenance. *See, e.g., id.* And the Court has made clear that, in light of the farmers' beneficial ownership of project water rights and the limited financial nature of the United States' interest therein, the government is not free to deal with them as it

might see fit, without restraint. *Nevada v. United States, supra.* Rather, the provision of Section 8 of the Reclamation Act mandating a beneficial use standard is a "specific congressional directive" which acts as a "restraint upon the Secretary." *California v. United States,* 438 U.S. 645, 678, n.31 (1978).

At least two cases have applied this "restraint" to invalidate previous attempts by Secretarial rulemaking to limit project water entitlements to less than the amount needed for beneficial use. *Fox v. Ickes,* 137 F.2d 30 (D.C.Cir.), *cert. denied* 320 U.S. 792 (1943); *Lawrence v. Southard,* 192 Wash. 287, 73 P.2d 722 (1937) (terming such a rule "a nullity"). Even the Ninth Circuit Court of Appeals has held that, in light of the limitation of Section 8 of the Reclamation Act, water contracts entered into by the Secretary cannot be enforced by the courts if they provide a "different water duty than a beneficial use inquiry would indicate." *Alpine,* 697 F.2d at 885.[17]

Beyond this express statutory restraint, moreover, is the restraint imposed by this Court's enunciation of the standards by which the legitimacy of administrative rules must be judged. The standard against which an administrative regulation is measured to determine whether it exceeds statutory authority has often been restated by this Court and is well-settled: it must be "reasonably related to the purposes of the enabling legislation" and

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[17] A determination of the amount of water necessary for beneficial use is a factual determination which varies according to soil type, crops, precipitation, conveyance losses and climate. *United States v. Alpine Land & Reservoir Co., supra,* 697 F.2d at 854-55. As the Ninth Circuit recognized, "It is not a hard and fast unit of measurement, but is variable according to conditions." *Id.*, quoting *Farmers Highline Canal & Reservoir Co. v. City of Golden,* 129 Colo. 575, 584-85, 272 P.2d 629, 634 (1954). As such it is not amenable to control by rulemaking, the hallmark of which is determination of general policy, rather than individualized facts; it must instead be determined through adjudication.

promote achievement of the legislative goals. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 370 (1973). *See also United States v. Larionoff*, 431 U.S. 864 (1977); *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 280-81, (1969), 386 U.S. 670 (1969); *American Trucking Assn. v. United States*, 344 U.S. 298 (1953); *Manhattan General Equip. Corp. v. Comm'r. Int. Rev.*, 297 U.S. 129 (1936).

The objective of the Reclamation Act, 43 U.S.C. §§ 372, *et seq.*, was to provide funding for large scale irrigation projects, *California v. United States*, 438 U.S. 645, 648 (1978), and to promote settlement of the largely unpopulated arid West. *Id.* at 658. In other words, the purpose of the statutory scheme was the settlement and irrigation of the arid lands in the West to make them productive.

Judged by this standard, the Operating Criteria are wholly unauthorized and beyond the scope of the Secretary's authority to adopt as regulations. Neither their purpose, their effect, nor their rationale bear any relationship whatever to the legislative goals of irrigation and settlement. To the contrary, the Criteria detract from those objectives since they operate to deny needed irrigation water to reclamation lands rather than to furnish it. That this is so is neither surprising nor accidental, for the Criteria were designed for the avowedly contrary goal of protecting and enhancing the asserted rights of *non-reclamation* lands and users, Pyramid Lake and the Pyramid Lake Paiute Tribe of Indians, in derogation of the adjudicated rights of the reclamation project lands and users.

In spite of the manifest antagonism between the Operating Criteria and the goals and purposes of the Reclamation Act, both courts below refused to hold unauthorized a purported regulation which indisputably reduces Newlands project landowners' vested water rights from the amount previously found necessary for beneficial use,

Alpine, supra, 503 F.Supp. 877, 888 (D.Nev. 1983); *aff'd* 697 F.2d 851, 856-857 (9th Cir. 1983), to a level which even the Ninth Circuit has observed, "would drastically reduce the farmers' yields over the long term." 697 F.2d at 856-857.

The district court in this case held:

> The only limit on the Secretary's ability to regulate the water supply is an upper limit. Here, the Secretary issued a regulation reducing the amount of water to be diverted. Consequently, the reduction was within the Secretary's authority.

App. 24.

The Ninth Circuit affirmed, stating:

> The Secretary did not exceed his authority when he adopted the operating criteria. In the 1926 contract, the Secretary explicitly reserved the right to issue rules and regulations governing the operation of the Newlands Project. This reservation allowed the Secretary to issue the regulation restricting the amount of water that would be diverted.

App. 9.

Ironically, even the *Tribe v. Morton* court acknowledged that "neither the Secretary nor this Court can adopt or require a regulation that would infringe upon [the *Orr Ditch* and *Alpine*] decrees." 354 F.Supp. at 257. Yet that infringement is the now-undeniable effect of the Criteria which the courts below nonetheless upheld. *See* discussion *supra*, p.6 n.9.

The scope of Secretarial rulemaking authority under the Reclamation Act is of extraordinary importance to tens of thousands of farmers on numerous federal reclamation projects throughout the seventeen Western States, and to the agriculture-based economies of those states. Reclamation projects furnish irrigation water to

11.4 million acres of land which in 1978 alone produced nearly five billion dollars' worth of crops. *Water and Power Resources Service: Project Data,* V (GPO 1981). Water is a scarce resource in the arid West; its availability in sufficient quantity spells the difference between valuable, productive agricultural land and worthless desert. Thus, the Ninth Circuit's holding that the Secretary of the Interior, without notice or hearing, may make binding reductions of the amount of water to which these project farmers' vested rights entitle them, has a potentially devastating impact on thousands of farmers, farm families and farming communities throughout the Western United States.

If the Ninth Circuit's decision is left intact, it is not improbable that the Secretary will increasingly be faced with demands and lawsuits seeking to require him to "comply with the mandate of Section 8 of the Reclamation Act" and adopt rules limiting water use on other reclamation projects. And, as in the *Tribe v. Morton* case, lawsuits challenging such rules as he may adopt, or challenging his failure to adopt such rules, may be brought in the District of Columbia, half a continent distant from the land and the water affected. The inconvenience and expense occasioned by the distance could place formidable obstacles to effective participation by reclamation farmers in any such action, a difficulty which is exacerbated if, as the courts below have held, the farmers' irrigation district has no standing to assert and protect their interests on their behalf. Thus, the rulemaking authority approved by the Ninth Circuit in this action could easily, as it has here, operate to effectively divest reclamation landowners and farmers of their essential vested water entitlements without any meaningful opportunity to be heard on the matter.

Such a holding so vividly contrasts with this Court's consistent and repeated recognition of the protected nature of the reclamation farmer's interest in his water rights that it merits review and reversal.

E. The Ninth Circuit's Conclusory Denial Of Due Process Protection To TCID's Contractual and Decreed Rights Merits Reversal.

The Ninth Circuit's decision also merits reversal because of its conclusory and erroneous rejection of TCID's own substantive rights under the Truckee River Agreement, the *Orr Ditch* decree, and the 1926 operating contract.

The Truckee River Agreement provided TCID with "the right to the use of thirty-one (31) percent of the diverted flow" "upon the Carson and Truckee Divisions of the Newlands Reclamation Project." App. 86. It further plainly provided, however,

> that at any time when the right [of other upstream diverters] to use any portion of the sixty-nine (69) percent of the diverted flow is not being fully exercised . . . and by reason of such fact there shall exist a flow of water available for diversion at [the Project's] Derby Dam in excess of the amount to which the [Truckee-Carson] Irrigation District is entitled at such time under the provisions of the Truckee River [*Orr Ditch*] Final Decree and/or this agreement, *the Irrigation District shall have the right to divert and use such excess for its own purposes.* (Emphasis added.)

App. 86.

The Truckee River Agreement was signed by the United States. It was also expressly adopted by the *Orr Ditch* court as a controlling part of the *Orr Ditch* final decree. Its plain language confers upon TCID proprietary rights of its own, to be used for its own purposes, separate from

the project rights beneficially owned by the project farmers. Because of the severe limits imposed on diversions of Truckee River flows into the Truckee Canal, the Criteria not only drastically infringe the project farmers' water rights, they completely eliminate TCID's right and ability to divert, for its own purposes, the water to which the *Orr Ditch* decree and the Truckee River Agreement entitle it.

TCID also has constitutionally protected rights in its 1926 operating contract which prevent its arbitrary termination. *See Lynch v. United States*, 292 U.S. 571, 579 (1934); *See also Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 279, n.33 (1969).

While the Ninth Circuit's holding eradicating these rights is not of as momentous or national proportion as its errors presented elsewhere in this petition, nevertheless its error is so plain and fundamental to its holding in the case that it deserves correction by this Court.

CONCLUSION

The dispute below raises serious questions concerning the power of the courts over coequal branches of the federal government and over the rights of persons not before them. It also raises questions concerning the authority of the Secretary of the Interior over essential rights of landowners on reclamation projects throughout the United States. Moreover, it reverses the effect of this Court's recent decision in *Nevada v. United States* governing the same basic dispute as that presented in the instant case, and does so on the basis of a standing determination which, itself, squarely conflicts with another of this Court's decisions, *Hunt v. Washington State Apple Advertising Com'n.* The Ninth Circuit Court of Appeals' decision is unadorned by either analysis or citation of authority. Particularly because its erroneous conclusions enabled it to avoid addressing the significant issues presented in TCID's challenge to the Operating Criteria, the decision of the court below merits consideration and reversal.

Respectfully submitted,

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